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ABSTRACT

Using Chaim Perelman's concept of the "universal audience" as a method of analysis, an investigation was made into the images of equality under the law in two landmark Supreme Court rulings on segregation, "Plessy v. Ferguson" and "Brown v. Board of Education." The analysis revealed that the Supreme Court in both decisions relied heavily on its image of social reality in deriving axioms representing the universal audience at a given historical moment. The concept of equality was the central term requiring definition. While the "Plessy" Court assumed the inferiority of blacks, the "Brown" Court assumed the equality of races. "Plessy" reflected an empirical definition of equality; if both races were treated the same, that was all the law could command. "Brown" reflected a less tangible view of equality; physical equality of facilities was not enough. The remaking of the concept of equality in correspondence with the tenets of the universal audience of its day, was the hallmark of the "Brown" decision. Thus, from the perspective of universal audience, the "Brown" decision appealed to a universal audience of greater wisdom than that of "Plessy." The analysis suggests that legal precedent and legislative history are less significant than the Court's image of reality in framing its opinions. (HOD)

THE SUPREME COURT AND IMAGES OF EQUALITY
A COMPARISON OF PLESSY V. FERGUSON AND BROWN V. BOARD OF EDUCATION

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ABSTRACT

This study investigates the images of equality under the law present in two landmark Supreme Court rulings on segregation, Plessy v. Ferguson and Brown v. Board of Education. Utilizing Perelman's concept of the "universal audience" as a method of analysis, the author concludes that both decisions relied heavily on the prevailing beliefs of reasonable persons about the social status of the races. Legal precedent and legislative history are found to be less significant than the Court's image of reality in framing its opinions.

THE SUPREME COURT AND IMAGES OF EQUALITY: A COMPARISON OF PLESSY V. FERGUSON AND BROWN V. BOARD OF EDUCATION

On May 17, 1984, little attention was paid to the thirtieth anniversary of one of the most important rulings ever handed down by the Supreme Court, Brown v. Board of Education.[1] In announcing that "segregation is a denial of the equal protection of the laws,"[2] the Court "marked the turning point in America's willingness to face the consequences of centuries of racial discrimination . . . ."[3] Although three decades after the historic decision, "most black children still go to predominately black schools,"[4] no one can deny that America has come a long way since the days of Jim Crow. Perhaps no greater testimony exists to this change than the nation's response to its first major black presidential candidate, Jesse Jackson. When George Wallace, who once stood in the schoolhouse door, shares a platform with Jesse Jackson, there is no doubt that racial attitudes have changed radically since the days of Brown. As Yale Kamisar wrote: "Regardless of its practical, tangible, direct effects . . . the symbolic quality of the decision was immeasurable; 'the psychological dimensions of America's race relations problems were completely recast'; the 'indirect consequences' 'awesome.'"[5]

The Brown decision has been the subject of considerable legal and social criticism. Its critics have focused primarily on "its off-hand dismissal of mountains of legal and historical research from both sides and . . . its pragmatic dependence on the present-day results of separate schools."[6] Rhetorical scholars have tended to focus on the rhetoric of the litigants in Brown, rather than on the decision itself.[7] David Hunsaker examines the rhetoric of Brown as "paradigmatic of the rhetoric of social protest," but his actual analysis primarily concerns the oral arguments of the plaintiffs.[8] Yet, Supreme Court decisions are themselves acts of symbolic inducement. As Don LeDuc points out, "legal principles continue to evolve, in large part because courts have the capacity to use each judicial opinion not simply to resolve a controversy, but also to communicate continually with audiences beyond those litigants actually before the court."[9] The rhetorical nature of judicial opinions is emphasized by Archibald Cox, who writes: "[The] capacity of judge-made law to command free assent depends upon the proposition that the decisions of judges rest upon principles more enduring than the wills of individual judges . . . ."[10] Justice Frankfurter seemed particularly concerned about rhetorical principles, when he wrote a memo to other members of the Court on May, 27, 1953, stating: "I know not how others feel, but for me the ultimate crucial factor in the problem presented by these cases is psychological--the

adjustment of men's minds and actions to the unfamiliar and the unpleasant. . . ."[11] The Court's audience is as broad as society as a whole, as Justice Brennan explains: "These opinions (are the exposition, not just to lawyers, legal scholars and other judges, but to our whole society, of the bases upon which a particular result rests--why a problem, looked at as disinterestedly and dispassionately as nine human beings trained in a tradition of the disinterested and dispassionate approach can look at it, is answered as it is."[12] Thus, a Supreme Court decision is a rhetorical effort to gain the assent of our whole society on the basis of enduring principles.

The general and abstract nature of the Court's audience requires an appropriate conceptual tool for analysis. Chaim Perelman's notion of the universal audience, drawn from the jurisprudential model, provides such a tool. Perelman writes of the universal audience:

> The appeal to reason is but an attempt to convince the members of this audience--whom common sense would define as well-informed and reasonable men--by addressing them. . . . It is this audience, with its convictions and aspirations, that the philosopher wants to convince starting with postulates and using arguments which he thinks will be acceptable to every one of its members. To achieve his end, the philosopher must use a rational argumentation . . . valid for the whole of the human community.[13]

Perelman also acknowledges that "the idea of a rational argumentation cannot be defined in abstracto, since it depends on the historically grounded conception of the universal audience."[14] It is this conception--or image--of the universal audience that provides the key to understanding the Court's rulings on segregation, because as, Kenneth Boulding points out, "behavior depends on the image."[15] The Court's image of its audience, therefore, includes the postulates it assumes are accepted by "well-informed and reasonable men," who constitute the "universal audience" at any given moment in history.

The historical nature of the image of the universal audience is exemplified by a comparison of the opinion in Brown with the opinion it overruled, Plessy v. Ferguson, written in 1896. Since argument directed toward the universal audience must proceed on the basis of postulates accepted by that audience, the "givens" underlying the Court's opinions inform us about the Court's image of the universal audience. My thesis is that changes in the image of social reality will alter the nature of these postulates and, hence, the nature of judicial argumentation. Despite the desire by some that the Supreme Court should stand above historical circumstance, it is impossible for this to occur. As Justice Burton pointed out during oral arguments on Brown, "the Constitution is a living document that must be interpreted in relation to the facts of the time in which it is interpreted."[16]

The concept of "equality under the law" is the central point on which the Brown and Plessy opinions turn. A comparison of the Court's image of equality in 1896 and 1954 reveals how judicial argumentation is historically grounded.

IMAGES OF EQUALITY

In the case of Plessy v. Ferguson, the Supreme Court rejected the claim of a black train passenger, Homer Plessy, that segregation on trains deprived him of the equal protection of the law. The Court wrote in its majority opinion:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but soley because the colored race chooses to put that construction upon it.
>
> . . . . . .
>
> Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences. . . . If one race be inferior to the other socially, the Constitution cannot put them upon the same plane.[17]

The belief in the social inferiority of the Negro was implicit in the Court's opinion. Even Justice Harlan, in his lone

dissent, shared the Court's perception of social reality, as he wrote: "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and, in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty."[18] The Court was merely reflecting its image of social reality. As Richard Kluger observes: "Had the Plessy Court chosen candidly to declare the prevailing view of the day among white Americans of every station, it would have said that no badge was necessary to proclaim what was self-evident. Keeping blacks separate, everyone understood, would prevent contamination of white blood by the defective genes of colored people . . . ."[19] This is a postulate that the Court presumed was accepted by "well-informed and reasonable men" who constituted the "universal audience."

Equality itself was viewed in an empirical or objective sense, summarized in the phrase, "separate but equal." If both races are treated "equally," this is all that is required. Whites are excluded from black cars and blacks from white cars--what could be more "equal?" The inferiority of the black was a fact of life, beyond the purview of the constitution.

Fifty-eight years later, in the Brown opinion, the Supreme Court reflected a broader view of equality. Intangible factors, beyond those of "objective" equality were considered. The Brown Court concluded: "To separate them [Negroes]

from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[20] The Court made a point of emphasizing the accomplishments of Negroes in spite of these handicaps: "[At the time of the adoption of the Fourteenth Amendment] Education of Negroes was almost non-existent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world."[21] This success was even more apparent in view of the presence of Thurgood Marshall, the chief lawyer for the NAACP. The act of segregation was viewed by the Brown Court as a denial of equal protection of the law because it created a perception of inferiority where none existed in reality. The empirical equality of Negroes was not enough. The opportunity for social equality must not be interfered with by arbitrary laws.

The Brown Court supported its findings by reference to the finding of a lower court that "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."[22] In addition, reference was made to

psychological findings. The Court asserted, "Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority."[23] This is followed by the famous footnote 11 to the works of psychologists and sociologists such as Kenneth Clark and Gunnar Myrdal.

The contrast between the Supreme Court's images of equality in 1896 and 1954 is striking. While the Plessy Court is informed by a narrow "empirical" view of equality, the Brown Court operated on an expanded view. The Plessy Court's image of its universal audience takes the social inferiority of blacks as a given, while the Brown Court made the opposite assumption. As Professor Cahn stated, "For at least twenty years . . . hardly any cultivated person has questioned that segregation is cruel to Negro school children. The cruelty is obvious and evident."[24] Clearly, just such cultivated persons were part of the Court's image of the universal audience.

EFFECTS ON LEGAL ARGUMENT

The rhetorical significance of the differing views of the universal audience is supported by an analysis of the legal argumentation employed in the two decisions. The Court cannot merely announce a decision and expect assent. It has no troops or police and must rely on others to enforce its edicts. The universal audience requires a reasoned opinion,

based on universal principles. Archibald Cox explains that "the effectiveness of the Court . . . is eroded by any failure to show how the novel decisions required by changes in human condition and the realization of bolder aspirations nonetheless draw their sanction from a continuing community of principle."[25] This principle of continuity is found in the use of legislative history and legal predecent in justifying decisions. In the broad sense, these represent argument from authority and analogy, respectively.

The Plessy Court rested its opinion on its interpretation of the intent of the authors of the Fourteenth Amendment, when they decreed, "nor shall any State deny to any person within its jurisdiction the equal protection of the laws." The Plessy Court wrote: "The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."[26] There was no empirical evidence of this claim, but given the Court's assumption that blacks were inherently inferior, it was obvious to the Justices that segregation was not a denial of equality. The unstated premise, "Negroes are inferior," needed no more proof than the statement today that "whites and blacks are inherently equal."

In the Brown case, the Southern lawyers placed a great deal

of weight on argument from authority, e.g. legislative history. They cited the practices of the Congress which had approved the amendment and also maintained segregated schools in the Capitol, as well as the segregationist practices of many ratifying states.[27] Although the NAACP attempted to nullify the legislative history issue, the best they hoped for was a standoff.[28] The Court ultimately discounted the historical issue. First, it denied the clarity of the historical record, as the NAACP had hoped:

> Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment. . . . This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.[29]

The Court then took aim at the historical differences between education in 1868 and 1954:

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. . . . Education of Negroes was almost nonexistent, and practically all of the race were illiterate. . . . It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the Congressional debates. Even in the North, the conditions of public education did not approximate those existing today. . . . As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.[30]

This passage is significant because the Court was arguing that <u>regardless</u> of the intent of the framers of the Amendment, the changing conditions of education warranted a changed interpretation: Despite <u>acts</u> of Congress and the States in segregating schools, which were pointed out by the defendants, these schools did not occupy a central place in American society. Thus, the Court stated:

> We must consider public education in the light of its full development and its present place in American life throughout the Nation. . . .
>
> Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.[31]

Thus, the Brown Court was free to reinterpret the meaning of "equal protection of the law" in light of changing historical circumstances. It did not confine itself to argument from the authority of the framers of the Fourteenth Amendment.

Argument from analogy (legal precedent) produced similar results. In Plessy, various precedents, including a number of State court decisions, are mentioned throughout the case. There is an attempt to adhere to even the remotest precedent. For example, much is made of the case of Roberts v. City of Boston, an 1850 Massachusetts Supreme Court decision, which is quoted at length. Particular significance is attached to the fact that Massachusetts was an abolitionist State and yet upheld segregation. The Plessy Court wrote:

> The most common instance of this [segregation of races] is connected with the establishment of separate schools for white and colored children, which have been held

to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is that of Roberts v. City of Boston . . . in which the supreme judicial Court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools.[32]

This is a decision from 1850, long before the Civil War and the adoption of the Fourteenth Amendment. Justice Harlan's dissent pointed out the inapplicability of Roberts to Plessy, which was " rendered prior to the adoption of the last amendments of the constitution, when colored people had few rights which the dominant race felt obliged to respect."[33] By relying on pre-war precedents, the Plessy Court chose to discount the impact of the new amendments on the meaning of "equality." Rather, it retained the old, narrow definition, which focused on a limited, empirical concept of equality. The acceptance of the inherent social inferiority of blacks makes the Constitution powerless to rectify it.

In the Brown case, the Court had the opportunity to overturn the Plessy doctrine of "separate but equal," a move it had avoided in several earlier cases. In the years

prior to Brown, the Court had expanded the black's right to education in graduate and professional schools, but always avoided a direct repudiation of Plessy. Thus, the Brown Court faced a set of ambiguous and conflicting precedents. According to Blaustein and Ferguson, "The nine men of 1954 strove to act within the framework of prior precedents. While Plessy v. Ferguson gave Supreme Court acceptance to state enforced segregation in transportation (and, inferentially, education), the Sweatt and McLaurin decisions [dealing with graduate education] denied the validity of racial classification as applied to state-supported colleges and universities. On May 17, 1954, the Supreme Court had to decide whether the criteria of equality developed in the Plessy case or the criteria of equality developed in the graduate school cases should be applied . . . in the primary and secondary school disputes."[34] Thus, two concepts of equality were available to the Court, depending on which precedents it invoked. No matter which route it followed, the Court was bound to violate an earlier precedent.

Perhaps because of the ambiguous situation on precedents, little attention is given to them in Brown. Only two paragraphs discuss precedents, and these are largely devoted to explaining why they are inapplicable. The Court dismisses Plessy v. Ferguson as "involving not education but transportation."[35] In Cumming v. County Board of Education and Gong Lum v. Rice "the validity of the doctrine [of separate but equal] itself

was not challenged."[36] In the more recent graduate school cases, the Court noted that "the quality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. . . . In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff."[37] The Brown case, however, forced the Court to directly face the issue of "the effect of segregation itself on public education."[38] Thus, the Brown Court showed only a minimal concern with the long legal history of racial segregation. The extent of the minimization of precedents is best evidenced by the treatment of Plessy. The assertion that it did not apply because it only dealt with transportation ignores the Plessy Court's reliance on Roberts, which dealt with education, as justification for segregation in transportation. This omission is notable because the Brown Court footnotes Roberts as the origin of the "separate but equal" doctrine. Thus, the Court ultimately relied very little on argument from analogy (precedent) in framing the Brown opinion.

The comparison of the Plessy and Brown opinions in their use of precedents is revealing because both decisions shaped their interpretation of legal precedent to fit their image of social reality and the universal audience. The Plessy Court relied on precedents clearly outdated by war and constitutional amendment. The Brown Court dismissed Plessy on questionable grounds, rather than attacking the

faults of the decision directly. Both Courts appear most concerned with upholding a definition of equality acceptable to the universal audience as constituted at that moment in history. The concern for the present is made explicit in the Brown decision, when the Court declares that, "we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written."[39] In short, as Justice Reed had written in an earlier decision, "when convinced of former error, this Court has never felt constrained to follow precedent."[40]

The Brown Court was criticized for relying on psychological and sociological evidence. In fact, both Plessy and Brown are based on the psychology and sociology of their era, although the Plessy Court felt no need to document the inferiority of blacks. Actually, there is evidence that psychological and sociological evidence played a far less significant role in Brown than critics contended. Chief Justice Warren, the opinion's author, later stated, "It was only a note, after all."[41] Warren's chief clerk, Earl Pollock, explained: "The only reason to have included footnote #11 was as a rebuttal to the cheap psychology of Plessy that said that inferiority was only in the mind of the Negro."[42] Thus, it is the Court's image of social reality that informs its view of equality. While the sources cited in footnote 11 may have bolstered their argument for the harms of segregation, there is ample evidence that the Court was aware of the evil effects of segregation even without the testimony of experts.

If the Court does not rely on sociological and psychological evidence, then how does one explain the origin of their image of social reality and the universal audience? The personal views of the Justices are not sufficient for judicial reasoning. As Justice Frankfurter stated in Dennis v. United States, "In finding that Congress has acted within its power, a judge does not remotely imply that he favors the implications that lie beneath the legal issues. . . ."[43] A useful concept in understanding how the judicial mind is informed, therefore, is "judicial notice." Justice Frankfurter employed this device in an exchange with Thurgood Marshall during the oral argument in the Brown case:

> JUSTICE FRANKFURTER: Can we not take judicial notice of writing by people who competently deal with these problems? Can I not take judicial notice of Myrdal's book [An American Dilemma] without having him called as a witness?
>
> . . . . . .
>
> I am merely going to the point that in these matters this Court takes judicial notice of accredited writings, and it does not have to call the writers as witnesses, but I did not know that we could not read the works of competent writers.[44]

This practice of "taking judicial notice" of writings or

common axioms of the universal audience is more widespread than may be readily apparent. It was important in the Brown case and, although not explicitly admitted, the foundation of much of the Plessy opinion. In a broad sense, the Court cannot escape the influences of the social reality it perceives. As Justice Frankfurter explained: "Since the litigation that comes before the Supreme Court is so largely entangled in public issues, the general outlook and juristic philosophy of the justices inevitably will influence their views and in doubtful cases will determine them."[45]

One other constraint on judicial decision making must be acknowledged. In framing an opinion, the author must also address his brethren on the bench. One of the great accomplishments of Warren's decision in Brown is that it was unanimous. Despite early indications of only a five-man majority, Warren worked to provide an inclusive decision that all nine justices could endorse.[46] The reason for this was plainly to increase the acceptance of the opinion by the nation as a whole. To some extent this need for unanimity helps to explain the final section of the Brown decision, which delayed the implementation of desegregation and requested a rehearing on that matter. Despite the compromise inherent in gaining a unanimous opinion, however, Warren's opinion "represented nothing short of a reconsecration of American ideals."[47] And he did it in an opinion which was "short enough and simple enough to appear on the front

page of every major newspaper in the country the day after it was handed down."[48]

CONCLUSIONS

The basic finding of this essay is that the Supreme Court in both the Brown and Plessy opinions relied heavily on its image of social reality in deriving axioms representative of the universal audience at a given historical moment. The concept of equality was the central term requiring definition. Although the Court utilized legislative history (authority) and precedents (analogy), these were secondary to the Court's own image of social reality. While the Plessy Court assumed the inferiority of blacks, the Brown Court assumed the equality of races. Plessy reflected an empirical definition of equality. If both races were treated the same, that was all the law could command. Social inequality was inherent in race and beyond the purview of the Constitution. Brown reflected a less tangible view of equality. Physical equality of facilities was not enough. Because of the impact of segregation on the minds of children, separate facilities were inherently unequal. The remaking of the concept of equality in correspondance with the tenents of the universal audience of its day, was the hallmark of the Brown decision.

Because the conception of the universal audience is historically grounded, it is not realistic to evaluate one decision

as better than the other. Both appealed to the beliefs of "well-informed and reasonable men" of their time. Since the universal audience is an abstraction, it is not possible to compare these conceptions with some objective audience "out there" in the world. However, this does not preclude an evaluative judgment. Perelman recommended that the worth of an argumentation is not measured solely by its efficacy but also by the quality of the audience at which it is aimed."[49] Who is to judge these audiences? "It can be said," writes Perelman, "that audiences pass judgments on one another."[50] Thus, from our current, and hopefully more enlightened perspective, the Brown decision appeals to a universal audience of greater wisdom than that of Plessy. The universal audience of today would no doubt rate Brown far more reasonable than Plessy. Yet, it is probably not appropriate to fault Plessy too severely for not anticipating the universal audience of more than a half century later. The Brown Court is to be commended, however, for not falling back on an outdated precedent rooted in a narrow conception of equality and a presumption of racial inferiority.

Although only two cases have been examined, it is not unreasonable to conclude that they represent a typical approach to judicial reasoning. On this model, rather than "objectively" considering all of the evidence, precedents, and legislative history, the Court's mind comes to its task already informed of the premises acceptable to the universal audience of its time.

Legal arguments are not based on "pure reason" but on an historically conditioned view of reason. While some might contend that this represents a deviation from the ideal, it is more likely that it represents an inevitable fact of human reasoning. Fortunately we are not forever bound to the precedents of the past, regardless of how they fit contemporary social reality. Nor are we simply at the whim of the personal opinion of nine persons. Rather, by virtue of the nature of judical reasoning, we have achieved "simple justice."[51]

NOTES

[1]347 U.S. 483 (1954). The opinion actually covered four cases dealing with the same issue. They had first been argued before the Supreme Court in 1952 and were reargued in 1953. The decision of May 17, 1954 struck down the constitutionality of segregation in public schools, but deferred until the next year the implementation of desegregation. A fifth case, Bolling v. Sharpe, 347 U.S. 497 (1954) struck down segregation in the District of Columbia and was delivered on the same day as Brown.

[2]Brown at 495.

[3]Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality (New York: Alfred A. Knopf, 1976), p. x.

[4]David G. Savage, "30 years later, debate rages on over intent of desegregation ruling," Sacramento Bee, 18 May 1984, p. AA1.

[5]Yale Kamisar, "The School Desegregation Cases in Retrospect," in Argument: The Oral Argument Before the Supreme Court in Brown v. Board of Education of Topeka, 1952-55, ed. Leon Friedman (New York: Chelsea House, 1969), p. xxiv. Quoted statements are from Robert Carter, "The Warren Court and Desegregation," Michigan Law Review 67 (1968), 247.

[6]Fred Rodell, "It is the Earl Warren Court," in The Supreme Court Under Earl Warren, ed. Leonard W. Levy (New York: Quadrangle Books, 1972), pp. 139.

[7]See Evelyn Schwartz, "A Descriptive Analysis of Oral Argument Before the United States Supreme Court in the School Segregation Cases, 1952-53," Diss. University of Southern California 1966.

[8]David M. Hunsaker, "The Rhetoric of Brown v. Board of Education: Paradigm for Contemporary Social Protest," The Southern Speech Communication Journal, 43 (1978), 91-109.

[9]Don R. Le Doc, "'Free Speech' Decisions and the Legal Process: The Judicial Opinion in Context," The Quarterly Journal of Speech, 62 (1976), 279.

[10]Archibald Cox, The Warren Court (Cambridge: Harvard University Press, 1968), p. 48.

[11]Kluger, p. 615.

[12]William J. Brennan Jr., "Insider View of the High Court," in Levy, p. 45.

[13]Chaim Perelman, Justice (New York: Random House, 1967), p. 82.

[14]Chaim Perelman, "The New Rhetoric: A Theory of Practical Reasoning," in The Great Ideas Today, 1970, ed. Robert M. Hutchins and Mortimer J. Adler (Chicago: William Benton, 1970), p. 286.

[15]Kenneth E. Boulding, The Image: Knowledge in Life and Society (Ann Arbor: University of Michigan Press, 1956), p. 6. Italics omitted.

[16]Kluger, p. 573.

[17]Plessy v. Ferguson, 163 U.S. 537 (1896), at 551-552.

[18]Ibid. at 559.

[19]Kluger, p. 305.

[20]Brown at 494.

[21]Ibid. at 490.

[22]Ibid. at 494.

[23]Ibid.

[24]Albert P. Blaustein and Clarence Ferguson, Jr., Desegregation and the Law: The Meaning and Effect of the School Segregation Cases, 2d. ed. (New York: Vintage, 1962), p. 136.

[25]Cox, pp. 48-49.

[26]Plessy at 544.

[27]Friedman, pp. 56-57.

[28]See Kluger, pp. 617-656.

[29]Brown at 489.

[30]Ibid. at 489-490.

[31]Ibid. at 492-493.

[32]*Plessy* at 544

[33]Ibid. at 563

[34]Blaustein and Ferguson, p. 118.

[35]*Brown* at 491.

[36]Ibid.

[37]Ibid. at 492.

[38]Ibid.

[39]Ibid.

[40]*Smith v. Allwright* quoted by Kluger, p. 560.

[41]Kluger, p. 706.

[42]Ibid.

[43]Ibid., p. 597.

[44]Cited in Schwartz, p. 59.

[45]Cited in Blaustein, p. 14.

[46]Kluger, p. 682.

[47]Ibid., p. 710.

[48]Hunsaker, p. 95.

[49]Perelman, "The New Rhetoric," p. 286.

[50]Chaim Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, trans., John Wilkerson and Purcell Weaver (Notre Dame: Univ. of Notre Dame Press, 1969), p. 35.

[51]Borrowed from title of Kluger.